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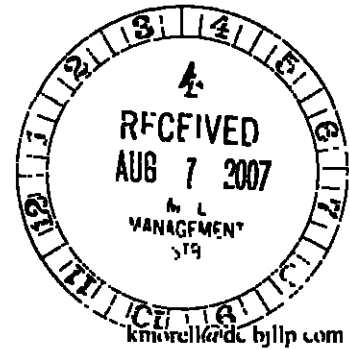
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KARI MORELL



August 7, 2007

BY HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
395 E Street S W
Washington, DC 20423

219964

Re STB Finance Docket No 35063, Michigan Central Railway, LLC –
Acquisition and Operation Exemption – Lines of Norfolk Southern
Railway Company

Dear Secretary Williams

Attached for filing are the original and ten copies of the Reply to
BMWED/BRS's Petition for Reconsideration Also enclosed is a diskette containing an
electronic version of the Reply

Please time and date stamp the extra copy of the Reply and return it with
our messenger

If you have any questions, please contact me

Sincerely yours,

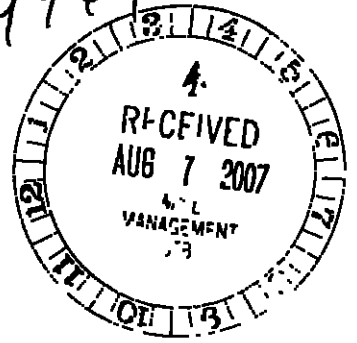
Karl Morell

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35063



**MICHIGAN CENTRAL RAILWAY, LLC –
ACQUISITION AND OPERATION EXEMPTION –
LINES OF NORFOLK SOUTHERN RAILWAY COMPANY**

**REPLY OF MICHIGAN CENTRAL RAILWAY LLC
TO BMWED/BRS'S PETITION FOR RECONSIDERATION**

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Michigan Central Railway, LLC**

Dated August 7, 2007

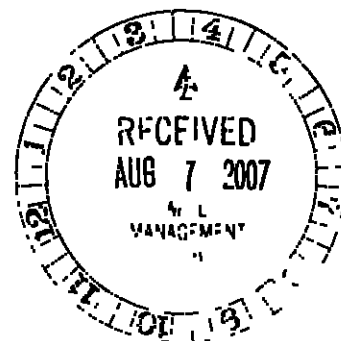
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35063



**MICHIGAN CENTRAL RAILWAY, LLC –
ACQUISITION AND OPERATION EXEMPTION –
LINES OF NORFOLK SOUTHERN RAILWAY COMPANY**

**REPLY OF MICHIGAN CENTRAL RAILWAY LLC
TO BMWED/BRS'S PETITION FOR RECONSIDERATION**

Michigan Central Railway LLC ("MCR") hereby replies to the Petition For Reconsideration of Procedural Schedule ("Petition") filed by the Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED") and the Brotherhood of Railroad Signalmen ("BRS") (dated August 1, 2007, but filed on August 3, 2007)

The Petition fails to show any good reason for modifying the procedural schedule adopted by the Board just last week, in a decision served on August 2, 2007 ("Decision"). The Decision contained no material error, and nothing in the alleged "new evidence" offered by BMWED and BRS provides any basis for reconsideration. In essence, BMWED and BRS offer only their own *unsubstantiated opinion* that the procedural schedule adopted in the Decision is "unreasonable." But the procedural schedule adopted in this proceeding compares favorably with those adopted recently in similar proceedings involving considerably larger transactions.

In short, BMWED and BRS have not demonstrated any specific reason why they cannot comply with the procedural schedule adopted in the Decision. In the absence of such a showing, MCR respectfully requests that the Board deny the Petition and adhere to the established schedule.

I. Procedural Background

The transaction at issue in this proceeding involves MCR's proposed acquisition of certain rail lines and trackage rights owned and operated by Norfolk Southern Railway Company ("NSR") in Michigan and Indiana. *See* Petition for Exemption (filed July 13, 2007) at 6-7. In order to address the concerns of interested parties, MCR and NSR have made extraordinary efforts to promote the full and accurate disclosure of information regarding this proposed transaction. In particular, MCR submitted complete copies of the parties' Transaction Agreement and all related agreements between the parties as part of its initial filings. These related documents include fourteen separate agreements addressing virtually every aspect of MCR's proposed acquisition of the rail lines at issue and all related transactions, whether or not these additional agreements are subject to regulatory review.

In addition, MCR and NSR voluntarily served complete copies of their initial public filings on all labor unions with employees on the affected lines (including both BMWED and BRS) at the time of their submission to the Board. The parties also voluntarily provided notice of these filings to shippers on the affected lines within one week of their initial filing.

Although the Board's regulations (49 C.F.R. § 1121.4(a)) provide that "public comments are generally not sought during consideration of exemption petition proposals," MCR specifically requested that the Board publish notice of the proposed transactions in the Federal Register, in order to provide interested parties adequate opportunity to comment. *See* Petition to Revoke Class Exemption (filed July 13, 2007) at 10. Under MCR's proposed procedural schedule, the date of the parties' initial filings would have been deemed Day 0, and the Board's notice of the proposed transaction was to be published in the Federal Register on Day 20, i.e., on August 2, 2007. *Id.* The Board allowed interested parties three additional days (beyond the parties' request) to comment on the proposed transactions, by making substantive comments due

on September 4, 2007 (33 days after the Federal Register Notice, and 53 days after the parties' initial filings)

II. Interested Parties Had Ample Opportunity to Comment on the Proposed Procedural Schedule.

BMWED and BRS assert that the Board "denied interested parties the opportunity to respond to the proposed procedural schedule" when it issued its Decision on August 2, 2007, 20 days after MCR's initial filings. This assertion is meritless for several reasons.

First, as noted above, the Board's regulations expressly provide that "public comments are generally not sought" in individual exemption proceedings. Therefore, the opportunity for public comment that MCR requested, and that the Board elected to provide, goes above and beyond the normal procedural requirements for such proceedings.

Second, the Board's rules do not indicate that the 20-day period for replies under 49 C.F.R. § 1104.13 ordinarily will be applied to the establishment of a procedural schedule (even if the schedule is requested or proposed by a party). To the contrary, the Board's established practices and precedents suggest that the Board does not routinely wait 20 days for replies before ruling on or adopting a proposed procedural schedule. *See infra* at 12-13.

BMWED and BRS assert that "[i]nterested parties had every right to expect that the Board would allow them the time to respond that is provided under 49 C.F.R. § 1104.12 [sic]." Petition at 2. But even if the 20-day period for replies normally provided under the Board's rules is deemed to apply to the adoption of a procedural schedule, that rule is not an inflexible command, and does not preclude the Board from granting requests for expedited consideration in particular cases.

In this case, MCR specifically requested publication of notice and a procedural schedule on Day 20, *i.e.*, August 2, 2007. MCR voluntarily served BMWED and BRS with

complete public copies of its initial filings BMWED and BRS therefore had actual notice that MCR had requested publication of notice in the Federal Register on August 2. Experienced STB counsel know that STB decisions are normally considered and decided by the Board several days *before* their publication in the Federal Register Thus, BMWED and BRS effectively had notice that the Board would need to reach a decision on the proposed procedural schedule several days *before* August 2, 2007, in order to achieve the requested publication date

BMWED and BRS apparently contend that they were entitled to ignore MCR's request for an August 2nd publication date, and to submit their comments on or after August 1 But such a claim is not consistent with the Board's rules and established practice, and if accepted, would preclude the Board from granting expedited relief in any case BMWED and BRS can hardly blame the Board for their own decision to submit comments on the proposed procedural schedule on the *day before* the parties had requested publication of notice in the Federal Register Thus, the Board's Decision on August 2, 2007, did not deprive BMWED and BRS of a fair and adequate opportunity to respond to the proposed procedural schedule

In any event, the Board did not reject the comments filed by BMWED and BRS on August 1, 2007, and presumably will consider those comments in connection with its consideration of their Petition Therefore, no conceivable prejudice could have resulted from the Board's Decision publishing notice of the proposed transactions and procedural schedule on August 2, 2007

BMWED and BRS also assert that they are "especially" entitled to rely on the full 20-day period for replies "in this case, where interested parties had to first learn of the filings by accessing the Board's website," and then had to "download and read hundreds of pages of documents and were in no position to respond quickly to the proposed schedule " Petition at 2-3.

These assertions are disingenuous. First, as noted above, MCR and NSR voluntarily served complete copies of their initial filings on BMWED and BRS (and on all labor unions with employees on the affected lines) at the time of their submission to the Board. On July 12, the day before making their filings with the Board, the parties also issued public press releases describing the proposed transactions. In addition, on July 11, two days before their filings with the Board, the parties voluntarily made courtesy telephone calls to (or left voice messages with) interested parties, including BMWED and BRS, in order to inform them of the proposed transactions. Thus, BMWED and BRS did *not* “first learn of the filings by accessing the Board’s website.” The fact that the parties’ filings were *also* available on the Board’s website provides no justification for the decision by BMWED and BRS to wait 20 days, until the day before the requested notice publication date, before filing their comments on the proposed procedural schedule.

In addition, the fact that the parties’ initial filings included “hundreds of pages of documents” provides no justification for delay. The parties *voluntarily* included copies of their Transaction Agreement and other related agreements between them regarding the proposed transactions (including 14 additional agreements) as part of their *initial* filings (with only minimal redactions) in the interest of full disclosure. These voluntary disclosures have facilitated and expedited the review of the proposed transaction by interested parties by eliminating any need for parties to request these documents in discovery, and eliminating any delay in their production. Practically speaking, BMWED and BRS did not need to complete their review of all of these related documents in order to “digest what the filings were all about,” (Petition at 3) and to offer their view on the proposed procedural schedule in this case.

BMWED and BRS also complain that they have “only had access to redacted versions of the filings” and that the Board’s “protective orders [were] only issued recently ” Petition at 4 But the parties have taken care to make only minimal, essential redactions of commercially sensitive data and information from the public versions of the filings in this case, and it is highly unlikely that these limited redactions would have any bearing on BMWED’s and BRS’s positions and arguments in this case More to the point, the Board issued its protective orders in these proceedings on July 27, 2007 Counsel for BMWED and BRS then waited *ten more days* before sending signed confidentiality undertakings to counsel for MCR and NSR in accordance with these protective orders Immediately upon receipt of these signed confidentiality undertakings, counsel for MCR and NSR arranged for highly confidential versions of the filings to be hand-delivered to counsel for BMWED and BRS on the same day Thus, BMWED and BRS cannot blame either the Board or the parties for their own delay in requesting unredacted versions of the filings

III. The Board’s Decision Contained No “Material Error”

BMWED and BRS assert that the Board’s Decision “was premised on a material error in interpretation” of 49 U.S.C. § 10502(b) Petition at 3 That section requires the Board to determine whether to begin an exemption proceeding within 90 days after receipt of a petition for exemption, and to complete any such proceeding within 9 months after it is begun See Decision at 3 BMWED and BRS assert that in adopting the proposed procedural schedule, “the Board referred to Section 10502(b), and stated that it was adopting the 90 day schedule in compliance with that provision ” *Id* Based on those statements, they assert that “the Board appears to have construed the [statute] as requiring a decision within 90 days.” *Id*

The Board’s Decision is entirely consistent with the statutory deadlines, and contains no material error After correctly paraphrasing the statute, the Decision stated (at 3) that

“[i]n compliance with the statute, this order will be issued, and a proceeding will be formally instituted ” In its ordering paragraphs (*id* at 4), the Decision further stated that “a proceeding is commenced” effective as of August 2, 2007. The August 2 effective date of the Decision clearly was within the 90-day limit for a decision on whether to begin a proceeding Moreover, the Board’s determination that it would issue a final decision on October 11, 2007, was and is consistent with the statute’s 9-month limit for a final decision The fact that MCR requested a procedural schedule that would permit the Board to reach a final decision within 90 days after MCR’s initial filings, and the fact that the Board adopted such a schedule, does not indicate that the Board misconstrued the statute, nor does it constitute “material error ”

IV. BMWED’s and BRS’s Alleged “New Evidence” Does Not Justify Reconsideration.

BMWED and BRS argue that reconsideration is appropriate “because of new evidence that should affect the Board’s decision,” consisting of the fact that “the Board ruled without knowing of the position of BMWED and BRS and others regarding the proposed schedule ” Petition at 3

The unsubstantiated “position” of BMWED and BRS does not constitute the type of “new evidence” that would justify reconsideration of the Board’s Decision under 49 C F R § 1115.3(b) Under that section, reconsideration is appropriate only if the Board’s prior decision would be “affected materially” because of new evidence *Id* The mere fact that BMWED and BRS would prefer to extend the procedural schedule adopted by the Board should not materially affect the Board’s Decision, *unless* BMWED and BRS also provide persuasive reasons for that request BMWED and BRS have failed to make any such showing.

V. The Board’s Decision Was Not Arbitrary, Capricious and Inherently Unreasonable.

BMWED and BRS argue that the Decision “is plainly unreasonable and prejudicial to other parties ” Petition at 4. Apart from this heated rhetoric, however, BMWED

and BRS offer no specific reason why any interested party might be unable to participate fully in this proceeding under the procedural schedule adopted by the Board, or how that schedule might prejudice the interests of any interested party

BMWED and BRS also assert that “the Board has already damaged the credibility of these proceedings” by adopting the procedural schedule proposed by MCR. Petition at 5. There is no justification for such irresponsible rhetoric, which is objectionable under 49 C.F.R. § 1104.8

BMWED and BRS also argue that the “comment period adopted by the Board requires that all of the document review, research, investigation and preparation of comments would have to occur when many people are likely to be away for substantial portions of the month of August.” *Id.* at 5. But MCR and NSR made their initial filings and submitted their proposed procedural schedule more than three and one-half weeks ago, in the first half of *July*. If counsel for BMWED and BRS believed that his or his clients’ vacation plans would interfere with a timely response to these filings, they had ample time to adjust those plans, or to seek alteration of the proposed schedule, *before* the requested notice publication date, on August 2, 2007. The Board’s timely management of its proceedings should not slow to a crawl during the months of July and August, simply because of the *possibility* that some parties might have other plans during those months. The same could be said of December and January, April and May, or any other time of the year.

BMWED and BRS assert that the procedural schedule adopted by the Board is “arbitrary and capricious.” *Id.* at 4. But it is axiomatic that the Board, like other administrative

agencies, has broad discretion to control its own proceedings¹ BMWED and BRS have failed to show that they are unable to comply with the Board's procedural schedule, or that any party would be prejudiced by that schedule

VI. The Procedural Schedule Adopted in this Proceeding Compares Favorably With Those Adopted in Comparable Proceedings.

As noted above, the procedural schedule adopted by the Board in this proceeding provides for the filing of substantive comments on September 4, 2007 — 33 days after the Board published notice of the proposed transaction in the Federal Register, and 53 days after the parties' initial filings. This schedule compares favorably with the notice periods provided in a number of recent proceedings before the Board, including several proceedings involving considerably larger transactions

For example, in STB Finance Docket No. 35031, *Fortress Investment Group LLC- Control—Florida East Coast Railway, LLC*, the parties submitted an Application for approval of the proposed transaction on May 22, 2007, and the Board published notice of its acceptance of the Application, along with a procedural schedule, on June 22, 2007. Comments regarding the proposed transaction were due on July 30, 2007 — 38 days after the Board published notice and a procedural schedule in the Federal Register. Notably, the Fortress-FEC proceeding involved an application for Board approval under 49 U.S.C. §§ 11321-26 (not an exemption petition under § 10901), and involved a much larger transaction, with a total value of approximately \$3.5 billion, and with the acquired carrier, Florida East Coast Railway, having

¹ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-544 (1978), *Association of Businesses Advocating Tariff Equity v. Hanzlik*, 779 F.2d 697, 701 (D.C. Cir. 1985) ("agencies are empowered to order their own proceedings and control their own dockets"), *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979); *GTE Service Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1986) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload") *citing Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975)

freight-related revenues of approximately \$264 million. The 38-day period for comments in that case is roughly comparable to the 33-day period in this proceeding, which involves an exemption petition under § 10901, and a much smaller transaction.

In STB Finance Docket No. 34972, *Fortress Investment Group LLC—Control Exemption—RailAmerica, Inc.*, Fortress's acquisition of RailAmerica and its 30 rail carrier subsidiaries was handled under the Board's class exemption procedures, allowing consummation of the proposed transaction 30 days after the date of filing of a notice of exemption. That proceeding also involved a much larger transaction, with a total value of approximately \$1.1 billion. The 30-day notice period before consummation in that case was much shorter than the 90-day period provided before the Board's final decision in this case. The 22-day period allowed for filing stay petitions in that case also was much shorter than the 53 days (from the parties' initial filings) allowed for substantive comments in this case, and shorter than the 33 days (from the Board's Federal Register notice) allowed here.

In STB Finance Docket No. 33813, *RailAmerica, Inc.—Control Exemption—RailTex, Inc.*, the parties requested an expedited procedural schedule governing a petition for exemption under 49 U.S.C. § 10502, for RailAmerica's acquisition and control of RailTex and its 17 domestic Class III rail carriers. The proceeding involved an exemption from the prior approval requirements of 49 U.S.C. § 11323-25 (not an exemption petition under § 10901), and involved a total value of approximately \$328 million, including \$205 million in cash and stock, and the assumption of \$123 million in long term debt. Notably, the Board did *not* wait 20 days for replies before issuing an expedited procedural schedule in that proceeding. Rather, the Board published notice of the petition and an expedited procedural schedule in the Federal Register *eight days* after the parties' initial filings, on November 16, 1999. The expedited procedural

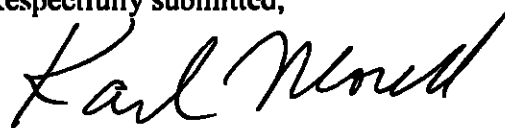
schedule provided that comments on the proposed transaction were due 20 days later, on December 6, 1999. The Board's final decision was served 60 days after the parties' initial filings. All of these time periods were considerably shorter than those requested in this proceeding.

As demonstrated by these examples, the Board has adopted comparable or shorter notice and comment periods in a number of proceedings involving similar (or larger) transactions. The 53-day notice period (from the parties' initial filings) and 33-day period (from the Board's publication of notice of the proposed transaction in the Federal Register) in this case compare favorably with the notice periods in each of the recent proceedings cited above. Thus, there simply is no reason to conclude that the procedural schedule adopted by the Board in this case is unreasonable, or would prejudice any parties' rights in any way.

CONCLUSION

MCR respectfully submits that there is no basis upon which to grant the Petition for Reconsideration filed by BMWED and BRS. Therefore, MCR respectfully requests that the Board deny that Petition, and adhere to the procedural schedule adopted in its August 2 Decision.

Respectfully submitted,



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Attorney for
Michigan Central Railway, LLC

Dated August 7, 2007

CERTIFICATE OF SERVICE

I hereby certify this 7th day of August, 2007, that I have caused the foregoing to be served by first class mail, postage pre-paid, on all parties that have entered appearances in STB Finance Docket Nos 35063, 35064 or 35065

Karl M. M. M.